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BEFORE THE

Federal Communications Commission

(NOV 24 1993)

WASHINGTON, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Implementation of Section 309(j)
of the Communications Act -
Competitive Bidding

PP Docket No. 93-253

To: The Commission

**REPLY COMMENTS OF
INDEPENDENT CELLULAR CONSULTANTS**

Independent Cellular Consultants, sometimes hereinafter referred to as "ICC", by its attorney, pursuant to the Notice of Proposed Rule Making ("Notice") adopted in the above-captioned proceeding, respectfully submits these Reply Comments for consideration by the Federal Communications Commission.^{1/}

I. PRELIMINARY STATEMENT

1. Independent Cellular Consultants is in the business of providing application filing assistance to eligible entities seeking the authorization of facilities in Commission-regulated radio services, including the Private Land Mobile Service (Part 90), Private Operational-Fixed Microwave Service (Part 94), Domestic Public Cellular Radio

^{1/} Notice of Proposed Rule Making (FCC 93-455), released October 12, 1993.

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Telecommunications Service (Part 22), and the Interactive Video and Data Service (IVDS) (Part 95 - Subpart F). Most recently, ICC has assisted its clients in the filing of IVDS applications for the nine markets that were accepted for filing by the Commission during July, August, and September of 1992.

2. In its Comments addressing the Notice, ICC strongly opposed the Commission's tentative conclusion that the award of IVDS licenses for markets beyond the top nine markets already filed for should be subject to auctions. ICC urged that the Commission first employ the statute's "principal use" standard to make a careful evaluation of the actual operations of IVDS systems rather than prematurely concluding that IVDS service will be offered on a commercial subscriber basis. ICC believes that careful analysis after IVDS systems are licensed and embark upon operation will reveal to the Commission that the service will be offered on a "no fee" basis to residential participants with system revenues flowing from interactive service providers, not residential subscribers. This model is the basis of the over-the-air broadcast service, which the statute exempts from auctions. Therefore, after careful consideration that system revenue is provider-based and not subscriber-based,

the Commission should afford itself the discretion to utilize lotteries for the award of IVDS markets.

3. In the event the Commission should fail to recognize the legal, practical and substantive pitfalls posed by the auction process, ICC's Comments suggested a number of initiatives consistent with the Commission's proposals that could expedite the provision of full IVDS service to the public and promote the participation by small entrepreneurs in telecommunications services. These steps include an IVDS frequency set-aside for small entrepreneurs, sealed bidding, reliance on royalty payments and relief from "up-front" auction admission payments.

II. DISCUSSION

A. Classification of IVDS as a "Broadcast" Service and the Continuance of Lotteries are the Best Methods for Assuring Rapid Implementation of IVDS and Protecting the Interests of Small Entrepreneurs.

4. ICC strongly believes that the best, most cost-efficient way for the Commission to meet its statutory mandate to promote:

. . . economic opportunity and competition and ensuring that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses . . .2/

is to continue employing lotteries for the selection of mutually-exclusive IVDS licenses.

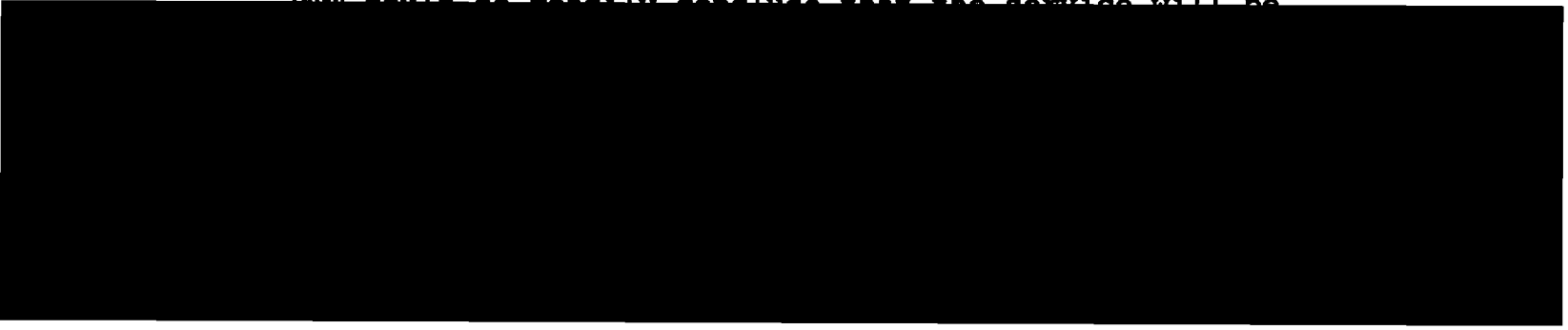
5. ICC is pleased that a number of parties participating at the Comment stage in this proceeding supported its positions. The Comments submitted by the Richard L. Vega Group ("RLV") are particularly insightful with respect to IVDS. Each IVDS system contains only one-twelfth the spectrum of a single video channel, and an even smaller portion of the bandwidth available to the LEC's, RBOC's, and cable TV operators who are and will be offering wireline broadband interactive services in direct competition with IVDS. These broadband operators do not obtain their system capacity by auction, thus making competition between them and IVDS licensees particularly unfair.^{3/} Given these constraints, self-generated interactive programming, with revenues flowing from residential units to the IVDS licensee, is not viable for the IVDS. What is viable is an IVDS based on the broadcast

2/ Section 309(j)(3)(B).

3/ RLV Comments at 11-12.

model, where third-party interactive service providers, such as programmers and financial institutions, pay the IVDS system licensee for access to residential units. If monthly subscriber revenue will not be generated, ICC urges that the FCC utilize its discretion to conduct lotteries for the IVDS. The Commission did not design the IVDS for competition with the immense financial resources of the cable-telephone industries. Hence, to require the IVDS applicant to bid for its spectrum is to further handicap this newborn industry and delay its nationwide rollout. Indeed, ICC sees great merit in RLV's proposal for an expeditious one-day filing window for all remaining IVDS markets to be followed rapidly by a lottery.^{4/} As the Commission well knows, the IVDS rules already contain relatively draconian construction and operation requirements to forestall speculation and spectrum warehousing.

6. ICC is puzzled and dismayed by the blanket support that Radio Telecom and Technology, Inc. ("RTT") offers for IVDS auctions. Since not one of the eighteen IVDS applications tentatively selected in the FCC's September 15, 1993 lottery has yet to be granted, ICC fails to discern how RTT could so readily conclude that the service will be



offered on a for-profit commercial subscriber basis and thereby meet the statute's definition for an auctionable service.^{5/} At a minimum, the Commission should wait until the initial IVDS systems are licensed and operating before drawing conclusions regarding the auctionability of the service.

7. ICC is aware of at least one IVDS tentative selectee, Raveesh K. Kumra, IVDS Block B for the San Francisco market, who has indicated that his licensed service will be offered on a "no fee" basis to subscribers. Given that fact, the FCC ought to fully evaluate the complete license applications of all tentative selectees and the experience of the IVDS market, once systems are licensed, before rendering an auctionability determination.

B. IVDS Spectrum Set-Asides Will Protect the Interests of Small Entrepreneurs.

8. Should the Commission insist on the invocation of auction procedures for the IVDS, ICC offers the following analysis which is also applicable to PCS and future frequency allocations that may be implemented by the Commission. ICC strongly believes that any IVDS auction

^{5/} RTT Comments at 1-2.

procedures should be crafted to enhance the opportunity of small entrepreneurs to provide IVDS and participate in America's telecommunications future.

9. ICC is pleased to note the support of the United States Small Business Administration ("SBA") for spectrum set-asides relative to designated entities, including small entrepreneurs.^{6/} ICC believes that at least one of the two frequency blocks within each IVDS market should be reserved for small entrepreneurs and further that the Commission ought to give serious consideration to reserving both IVDS frequency blocks in markets below the top 100 for small entrepreneurs.

10. In its Comments, ICC noted that sealed bidding and payment schedules that avoided the requirement for upfront cash "on the barrelhead" would serve to enhance the participation of small entrepreneurs in the auction process. ICC notes that the RLV Group concurs with its position that oral bidding works to the detriment of small entrepreneurs, and that sealed bids, together with electronic bidding, enhance participation by small entrepreneurs who do not possess the substantial financial resources of large

^{6/} SBA Comments at 18-19.

telecommunications service providers.^{7/} Further, there is significant merit to the position that small entrepreneurs should be able to participate in an auction employing a combination of initial cash deposit, installment payments, royalties, and tax certificates, rather than be required to make full payment in lump sum at time of auction, as proposed by the Commission.^{8/} The SBA correctly deflates the arguments which the FCC has offered in opposition to royalty payments. The SBA notes that utilization of a royalties payment procedure would be neither complex nor costly to administer.^{9/} ICC again urges that the Commission recognize that royalty payments are an important component in assuring that the spectrum is not totally controlled by "deep pockets" telecommunications providers. Moreover, given its concurrence with the comments of the Alliance for Fairness and Viable Opportunity, ICC does not accept the FCC's apparent premise that a business would intentionally suppress system revenues to avoid higher royalty payments to the Commission.^{10/}

^{7/} RLV Comments at 3.

^{8/} RLV Comments at 5.

^{9/} SBA Comments at 25-6.

^{10/} AFVO Comments at 11.

WHEREFORE, THE PREMISES CONSIDERED, Independent Cellular Consultants hereby respectfully submits the foregoing Reply Comments and urges that the Federal Communications Commission act in a manner fully responsive to the recommendations contained herein.

Respectfully submitted,

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